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No. 14-10008

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Introduction

The State has no case against Mr. Wearry without Sam Scott. Until he came forward, the case was cold. He is their only purported eyewitness to the murder of Eric Walber.

At the post-conviction evidentiary hearing, Lakendrick Scott and his wife, Doris Dantzler-Scott, testified. Lakendrick is Sam Scott's brother. Lakendrick has a clear memory of April 4, 1998, the day of the murder. It was his mother and uncle's birthday, and he and Sam went to their joint birthday party. They arrived together at 10:00 or 11:00 a.m., and stayed until 5:00 or 5:30 p.m. Lakendrick and Sam left the party together. They drove together to Sam's girlfriend's house, where they showered and changed clothes. They left Sam's girlfriend's house together and went to the Strawberry Festival. Lakendrick remembered where they parked. Around 15 to 20 minutes after they arrived

at the Strawberry Festival, Lakendrick and Sam met up with some friends, including co-defendants Shadrick Reed and Darrell Hampton. Then Doris Dantzler and her friend, Shyllorie Ard, met up with them all. Lakendrick remembered staying at the Strawberry Festival until it was time to pick up Sam's girlfriend from work, around 10:00 or 11:00 p.m. Lakendrick was asked at the evidentiary hearing:

> *Q. From the time you got to the Strawberry Festival until you left to pick up Sam Scott's girlfriend, was Sam Scott with you?*
>
> *A. Yes, the whole time.*

August 2012 Tr., p. 26: 5 – 8. And when they did leave, Lakendrick Scott again rode with Sam Scott. After Sam Scott's girlfriend got off work, the three of them drove around, smoked some marijuana and dropped off Lakendrick at his mother's house about 11 p.m. Lakendrick Scott went on to testify that he was never contacted by the local police or an investigator.

Doris Dantzler-Scott testified she knew Lakendrick and Sam Scott in April 1998. She specifically recalled being at the Strawberry Festival on April 4th, 1998, because that was when she and Lakendrick had planned to meet up for their first date. She met him about 7 p.m. that Saturday night. Lakendrick was with Sam Scott and two or three more guys that she did not know. She recalled hanging out with Lakendrick and Sam Scott. During the State's cross examination, Ms. Dantzler-Scott was asked:

> *Q. And you were able to remember that evening on your own?*
>
> *A. Yes, sir.*
>
> *Q. Any reason why? Did it stand out as being a big event 14 years ago?*
>
> *A. That was ... our first official date meeting up at the Strawberry Festival.*
>
> *Q. How did you know it was the Saturday evening of the Strawberry Festival?*

A. Because it was also his mother's birthday.

August 2012 Tr., p. 44: 20 – 29. Trial counsel never talked to Lakendrick or Doris, and the jury never heard from them due to trial counsel's ineffectiveness. Despite the major inconsistencies in Sam Scott's statements suggesting that he was not an eyewitness, trial counsel made no effort to investigate Scott's story.

The State's Brief in Opposition has only a pejorative in response to this detailed testimony: "No rational jury would disregard all of [the trial] evidence in favor of Lakendrick's and Doris' inconsistent testimony." *Respondent's Brief* at 25. But what if the jury had learned that investigators, while navigating Sam Scott's wildly inconsistent statements, provided him with material facts about the murder? What if the jury had heard from the alibi witnesses presented by post-conviction counsel? Or heard from orthopedic surgeon Dr. Dworak and forensic pathologist Dr. Riddick, who were both convinced that Sam Scott's story could not be true? A jury could have heard these things had there been no *Brady* violations. A jury could have heard these things had trial counsel not been uniformly deficient. And if a rational jury had heard these things, it probably would have disregarded Sam Scott's testimony.

I. Respondent Mischaracterizes the Controlling Law of this Court

Respondent repeatedly mischaracterizes the applicable law of the Court set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), and their progeny. And Respondent fails to address trial counsel's deficient performance as part of its *Strickland* analysis, so Respondent has conceded this point.

A. Under this Court's *Brady* Doctrine, Materiality is Assessed Cumulatively

In addressing Petitioner's *Brady* issue, Respondent asserts that "[t]he information cannot be considered material under this Honorable Court's definition of materiality and petitioner did not show that, in conjunction with the trial evidence . . . the information would have changed the outcome of this trial." *Respondent's Brief* at 13. But Respondent responds to Petitioner's *Brady* evidence item by item, in direct contravention of this Court's precedent. Rather than analyzing the cumulative effect of the undisclosed evidence, Respondent discounts the effect that each piece of evidence would have had on the jury in light of the trial evidence. *See, e.g., Respondent's Brief* at 16 ("In order to believe Dr. Dworak's ultimate opinion that Hutchinson couldn't walk or bend his knee, the jury would have had to disregard all the other evidence presented at the trial."); *see also Respondent's Brief* at 22 ("[P]etitioner cannot and did not show that use of this information [Rene Helm's statement to the police] would have led to a different outcome in his trial.").

This Court has long-mandated that the materiality of undisclosed impeachment and exculpatory evidence be analyzed collectively. *See Bagley v. United States*, 473 U.S. 667, 683, 105 S. Ct. 3375, 3384 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 436, 115 S. Ct. 1555, 1567 (1995). In *Bagley*, this Court held that a reviewing court should assess materiality "in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 473 U.S. at 683. A decade later, in *Kyles*, this Court explicitly directed that "[t]he fourth and final aspect of *Bagley* materiality to be stressed here is its definition

in terms of suppressed evidence considered collectively, not item by item." *Kyles*, 514 U.S. at 436. Respondent's brief fails to follow this clear directive.

As a corollary issue, Respondent mischaracterizes the legal standard applicable to Petitioner's claim that the State failed to disclose that jailhouse informant Eric Charles Brown requested favorable treatment from both law enforcement and the District Attorney. In its brief, Respondent alleges that "[t]he fact that Brown may have sought consideration is irrelevant under the law" and that "the question is whether the witness believed he had been promised or was likely to receive some consideration for his testimony," suggesting that Brown's request for consideration cannot even be considered *Brady* evidence. *Respondent's Brief* at 17. Respondent makes a distinction without a difference. Whether there is proof that Brown actually obtained favorable treatment is beside the point. First, the suppressed documents remain inconsistent with what the prosecution told the jury, that not only did Eric Charles Brown not have a deal, he didn't want one, didn't need one, and came forward out of altruism. *See Giglio v. United States*, 405 U.S. 150, 155, 92 S. Ct. 763, 766 (1972) ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [a witness's] credibility and the jury was entitled to know of it.").

Second, this Court has made clear that *Brady* material includes evidence showing a desire to get a deal, even where a formal deal is never reached. In *Bagley v. United States*, 473 U.S. 667, 683-684, 105 S. Ct. 3375, 3384 (1985), the prosecution offered two of its witnesses the "possibility of a reward", which provided "a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a

conviction." As this Court has explained, the key question is not whether a formal agreement existed between the witness and the State but whether the witness "might have believed that [the state] was in a position to implement . . . any promise of consideration." *Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 1177 (1959).

B. *Strickland* Prejudice, as Established by this Court's Precedent, is Assessed in Light of the Totality of Trial Counsel's Errors

Respondent similarly misapplies the *Strickland* prejudice standard in evaluating trial counsel's errors in isolation. *See, e.g., Respondent's Brief* at 25 ("No rational jury would disregard all of that [trial] evidence in favor or [sic] Lakendrick and Doris' inconsistent testimony and therefore, the post-conviction hearing evidence cannot be said to undermine confidence in the jury's verdict"). This Court has directed that the errors of trial counsel, which form the grounds for ineffective assistance of counsel claims, be viewed as a whole rather than in isolation.[1] *See Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068-2069 (1984) ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, *absent the errors*, the factfinder would have had a reasonable doubt respecting guilt.") (emphasis added); *see also Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515 (2000) ("[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.") (internal

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[1] This Court recognizes a prejudice standard under *Strickland* that is identical to the *Brady* materiality standard articulated in *Bagley*. *See Bagley v. United States*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985) ("We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover . . . cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

citations omitted). In reversing the circuit court's denial of Petitioner's penalty phase claim of ineffectiveness in *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S. Ct. 2456, 2469 (2005), this Court found:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

Id. (internal citations omitted). Time and again, this Court has emphasized that the prejudice inquiry is a global one: in *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542 (2003) (emphasis added), another case involving a claim of penalty phase ineffectiveness, this Court stated that "[i]n assessing prejudice, we reweigh the evidence in aggravation *against the totality of available mitigating evidence*." Here, Respondent simply does not do this.

II. Conclusion

After Petitioner was indicted in Livingston Parish (in which African Americans make up about 3-4% of the population), instead of in Tangipahoa Parish where Eric Walber's body was found (roughly 35% African American), Petitioner faced an all-white jury in a highly charged capital case with no physical evidence where the State's case was based on the materially variable accounts of jailhouse informant, Sam Scott. The undisputed testimony of the investigating officer, Murphy Martin, in a deposition conducted by post-conviction counsel, was that he provided material facts about the crime to Sam Scott. The undisputed testimony of other investigating officers and the former Chief of Detectives, Kearney Foster, at the post-conviction evidentiary hearing was that it

is wrong to give material facts to a witness. Petitioner's post-conviction forensic pathologist, Dr. Riddick, was clear at the post-conviction evidentiary hearing that Sam Scott's trial testimony that Eric Walber was run over three times (a claim used as an aggravating circumstance by the State) was not true; Mr. Walber was not run over more than once. Orthopedic surgeon Dr. Dworak was also clear at the evidentiary hearing that Randy Hutchinson's activity as described by Sam Scott would have fully disrupted his patellar tendon repair, and if fully disrupted, Hutchinson would not have been able to walk. Hoping to distract from these facts, Respondent resorts to hyperbole. No matter how often Respondent uses pejoratives like, "completely mischaracterizing trial testimony," "such a conclusion is absurd," "so-called alibi," or varied themes, these facts are what they are. As John Adams noted: "Facts are stubborn things; and whatever may be our wishes, they cannot alter the state of the facts of the evidence."

Respectfully submitted,

Dated: September 8, 2015

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's *Reply to Respondent's Opposition to Petition for Writ of Certiorari* was served via regular U.S. Mail, on this 8th day of September, 2015 upon Patricia Parker Amos, Assistant District Attorney for the Livingston Parish District Attorney's Office, P.O. Drawer 639, Amite, LA 70422. All persons required to be served have been served.

Dated: September 8, 2015

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September 8, 2015

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U.S. Supreme Court
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Re: *Michael Weary v. Burl Cain, Warden*
Docket No. 01-FELN-015992
USSC No.: 14-10008

VIA CERTIFIED MAIL

Dear Clerk:

Please find enclosed petitioner's *Reply to Respondent's Opposition to Petition for Writ of Certiorari to the Louisiana Supreme Court* that we ask that you place on your docket.

I have enclosed an original, 10 copies for filing and an extra copy to be stamped and mailed back to us in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter.

Sincerely,

Denise Nicholl

Denise Nicholl
Paralegal

Enclosure

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